Nos. 97-1943 and 97-1992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KAREN SUTTON and KIMBERLY HINTON,
Petitioners,
v.
UNITED AIR LINES, INC.,
Respondent.

VAUGHN L. MURPHY,
Petitioner,
v.
UNITED PARCEL SERVICE, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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36pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE MICHIGAN MANUFACTURERS ASSOCIATION IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit this brief as *amici curiae*.[1] Letters of consent from all parties have been filed with the Court. The brief urges this Court to affirm the decisions below, and thus supports the position of Respondents United Air Lines, Inc. and United Parcel Service, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its members include over 300 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (the Chamber) is the largest federation of business companies and associations in the world. The Chamber represents an underlying membership of more than

[1] Counsel for *amici curiae* authored the brief in its entirety. No person or entity, other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on employment law issues of national concern to the business community.

The Michigan Manufacturers Association (MMA) is an association of private Michigan employers studying matters of general interest to its members; promoting their interests and the interests of all Michigan employers in the proper administration of laws; and otherwise promoting the general business and economic welfare of Michigan. MMA's over four thousand members employ 90% of the industrial workforce in Michigan—over one million employees. An important aspect of MMA's activities is representing its members' interests in matters before the courts as *amicus curiae*.

All of EEAC's members and many of the Chamber's and MMA's members are employers subject to Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111-12117 (Title I). Many own commercial facilities subject to Title III of the ADA, 42 U.S.C. §§ 12181-12189 (Title III), and many own, operate, lease, or lease to places of public accommodation, also subject to Title III. Moreover, many members are federal contractors subject to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, which requires covered employers to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also, some members are the recipients of federal financial assistance and therefore are subject to the nondiscrimination provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 share a common definition of "disability" which establishes the parameters of the protected class under each statute.[2] Both statutes define "disability" in terms of an impairment that "substantially limits" a major life activity. Thus, EEAC's, the Chamber's and MMA's members have a direct interest in the issues presented in this case; *i.e.*, whether a court should determine whether an individual has a disability based on the individual's use of corrective measures, and whether an individual can establish a "regarded as" claim under the ADA simply because the individual has an impairment or medical condition that renders the individual unqualified for a particular job.

Because of their interest in the application of the nation's fair employment laws, EEAC, the Chamber, and MMA have filed briefs as *amicus curiae* in numerous cases before this Court.[3] Thus, EEAC, the Chamber, and

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[2] The ADA definition of "disability" mirrors the definition of "handicapped individual" that appeared in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, at the time the ADA was passed, and the ADA's legislative history confirms the Rehabilitation Act as the source of the ADA definition. S. Rep. No. 101-116, at 21 (1989); H.R. Rep. No. 101-485, pt. 2, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 332. *See also Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998) ("[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act.")

[3] EEAC participated as *amicus curiae* in *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998), which addressed the definition of a "disability" under the ADA. EEAC also participated as *amicus curiae* in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and other cases in this Court construing the Rehabilitation Act of 1973. *E.g., Alexander v. Choate*, 469 U.S. 287 (1985); *CONRAIL v. Darrone*, 465 U.S. 624 (1984); *University of Texas v. Camenisch*, 451 U.S. 390 (1981). EEAC and the Chamber have participated in numerous other employment discrimination cases before this Court. *E.g., International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991) (sex discrimination); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (sexual harassment); *Hazen Paper Co. v. Biggins* 507 U.S. 604 (1993) (age discrimination). MMA has also filed briefs with this Court in *Chrysler Corp. v. Smolarek, cert. denied*, 493 U.S. 992 (1989) (whether § 301 of the Labor Management Relations Act preempted claims under Michigan's Handicappers' Civil

MMA have an interest in, and a familiarity with, the issues and policy concerns involved in this case.

EEAC, the Chamber, and MMA seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not been brought to its attention by the parties. Because of their experience in these matters, EEAC, the Chamber, and MMA are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASES

Sutton v. United Air Lines, Inc.

Petitioners Karen Sutton and Kimberly Hinton are twin sisters who were commercial airline pilots for regional commuter airlines. Each had a "life long goal to fly for a major air carrier." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 895 (10th Cir. 1998). While each of the Petitioners has 20/20 corrected vision in both eyes, without correction their vision is 20/200 in the right eye and 20/400 in the left eye. *Id.* As a result, the sisters do not qualify for commercial airline pilot positions with United Air Lines ("United") because the company requires that applicants for pilot positions have at least 20/100 uncorrected vision in each eye. *Id.*

The sisters sued United under ADA, alleging that United had discriminated against them because they were substantially limited in the major life activity of seeing. Alternatively, the sisters alleged that United regarded them

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Rights Act) and *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) (retroactive application of an amendment to the Workers' Disability Compensation Act in Michigan). EEAC, the Chamber, and the MMA all participated in *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (after-acquired evidence) before this Court.

as disabled by regarding them as substantially limited in the major life activity of working. *Id.* The district court held that the sisters were not disabled under the ADA because their vision impairments, when corrected, did not substantially limit a major life activity. *Id.* at 896. The district court further found that United did not regard the sisters as disabled. *Id.* On appeal, the Tenth Circuit affirmed the district court's decision. *Id.* at 906. The Court granted the sisters' petition for a *writ of certiorari.*

Murphy v. United Parcel Service, Inc.

Petitioner Vaughn Murphy ("Murphy") has had high blood pressure since he was ten years old. *Murphy v. UPS*, 946 F.Supp. 872, 875 (D. Kan. 1996). In August of 1994, he applied for a position with United Parcel Service, Inc. ("UPS") as a mechanic. Since UPS mechanics are required to drive large trucks, they must hold commercial driver's licenses. *Id.* In order to hold a commercial driver's license, the Department of Transportation ("DOT") requires that an individual meet certain physical qualification standards, including a blood pressure level less than 160/90. *Id.* at 876. When Murphy took his DOT physical examination in August of 1994, his blood pressure was 186/124, well above the DOT limit. The testing clinic, however, erroneously issued him a "DOT health card." Approximately one month later, while reviewing medical records, UPS' Medical Services Supervisor discovered the error. UPS terminated Murphy after retesting his blood pressure, and confirming that it exceeded the DOT limit. *Id.*

Murphy sued UPS under the ADA, arguing in part that UPS had discriminated against him because he had a disability, or alternatively, because it regarded him as having a disability. The district court granted summary judgment in favor of UPS, and Murphy appealed. *Id.* at 884. The Tenth Circuit affirmed the district court's deci-

sion, finding that whether Murphy was substantially limited should be determined in his medicated state and that UPS did not regard Murphy as disabled because it relied on the DOT blood pressure standards. *Murphy v. UPS*, 1998 U.S. App. LEXIS 4439 (10th Cir. 1998) (unreported decision). This Court granted the petition for a *writ of certiorari*.

SUMMARY OF ARGUMENT

The Court of Appeals properly concluded that Petitioners are not individuals with disabilities protected by the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (ADA). Whether an individual has a "disability" as defined by the plain language of the ADA turns on whether the individual has an impairment that in fact "substantially limits a major life activity." 42 U.S.C. § 12102(2). Therefore, any mitigating measures the individual uses to reduce the effect of the impairment necessarily affects this determination. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997). The legislative history, although conflicting, ultimately supports this conclusion. Thus, the EEOC's guidance is entitled to no deference because it is manifestly contrary to the statute.

The ADA was not intended to cover those individuals who have common, minor impairments that are easily controlled. Rather, it requires that an individual be "substantially limited," a comparative term that "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). An individual with a commonly controlled, widely-shared condition is simply not "substantially limited" as compared to the average person. Indeed, the First and Fifth Circuits both have suggested that even if the EEOC guidance is to be deferred to on the question of whether mitigating measures should be used, the guidance is not applicable unless serious impairments are at issue. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470 (5th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3561 (Dec. 2, 1998) (No. 98-1365); *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998).

The notion that a contrary ruling will prevent individuals from utilizing such measures is meritless. Rational individuals will not forego necessary medical procedures simply to obtain the Act's protections. Further, an individual who does not utilize available corrective measures may in fact lose the Act's protections because they are not qualified. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995).

The Court of Appeals also correctly concluded that the employers in these cases did not regard the petitioners as disabled. In order to estabilsh that an individual is regarded as disabled, the individual must establish that he or she is regarded as being substantially limited in a major life activity. 42 U.S.C. § 12102(2)(C). The simple perception that an individual is unable to perform a particular job does not translate into a perception that the individual is substantially limited in employment opportunities in general. Further, rejection based on a medical condition or a medical standard does not automatically establish a "regarded as" claim. *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996). A contrary ruling not only would prohibit employers from developing legitimate qualification standards, but will result in extensive litigation for the courts and employers. This is not the result Congress had in mind when passing the ADA.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT WHETHER AN INDIVIDUAL HAS A DISABILITY SHOULD BE ASSESSED BASED ON THE INDIVIDUAL'S USE OF CORRECTIVE MEASURES

A. The ADA Requires That An Individual Actually Be Substantially Limited In a Major Life Activity To Establish a Disability Under the ADA

The Court of Appeals correctly concluded that the plain language of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.*, requires that an assessment of whether an individual has a disability under part A of the ADA's definition of "disability" take into account the individual's use of corrective measures. *Sutton v. United Air Lines*, 130 F.3d 893, 902 (10th Cir. 1998). The ADA prohibits discrimination in employment against a "qualified individual with a disability." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). The verb "limits" is used in its present tense form. Therefore, an individual who is not presently "substantially limited" in a major life activity does not have a "disability" under part A of the statutory definition. Thus, if an individual currently is able to control the effects of his or her impairment with medication or other mitigating measures so that he or she is not substantially limited in a major life activity, he or she should not be considered disabled under part A of the definition.

Like the Tenth Circuit, the Sixth Circuit has held that the plain language of the ADA requires that a "disability" under part A be evaluated based on the individual's limitations with the use of medication. *Gilday v. Mecosta County*, 124 F.3d 760 (6th Cir. 1997) (Kennedy, J. and Guy, J. concurring on this point.).[4] Judge Kennedy, in her concurring opinion, pointed out that the term "sub-

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[4] Conversely, the Second, Third, and Eleventh Circuits have unequivocally ruled that mitigating measures should *not* be considered. *Barlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998), *petition for cert. filed*, No. 98-1285, 67 U.S.L.W. 3528 (Feb. 23, 1999); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997); *Harris v. H&W Contr. Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996). The Ninth Circuit has mentioned this same principle although it decided the case on other grounds. *E.g., Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), *cert. denied*, 502 U.S. 1162 (1997); *Kirkingburg v. Albertsons, Inc.*, 143 F.3d 1228 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 791 (1999). While one Seventh Circuit panel clearly held that mitigating measures should not be considered, *e.g. Baert v. Euclid Bev., Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998), another Seventh Circuit panel cited the EEOC's guidance on evaluating a disability without regard to mitigating measures, but then proceeded to analyze whether the plaintiff had a disability based on his use of eyewear. *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446 (7th Cir. 1995). The Eighth Circuit similarly endorsed the notion that mitigating measures should not be considered in *Doane v. City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998), but took an approach similar to *Roth* in *Zirpel v. Toshiba Am. Info. Sys.*, 111 F.3d 80, 81 (8th Cir. 1997) (determining that individual was not disabled based in part on the fact that the panic disorder was very manageable with treatment, thereby endorsing argument that mitigating measures should be considered.) The First Circuit has held that mitigating measures should not be taken into account, but limited its decision to diabetes, and suggested that it could take a different approach if a different medical condition were at issue. *Arnold v. UPS*, 136 F.3d 854, 859-866 (1st Cir. 1998). The Fifth Circuit has taken a middle of the road approach, holding that only "serious impairments" should be considered without regard to mitigating measures, but reserving the determination of what is "serious" to be resolved on a case-by-case basis. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-471 (5th Cir. 1998).

stantially limited" would be written out of the statute if a person were not in fact evaluated given the effects of his or her medication. In rejecting the EEOC's opposite conclusion as to the meaning of the ADA, Judge Kennedy observed as follows:

> The EEOC is creating a different standard for persons who take medication for their condition. This conflicts with the *plain reading* of the statute. The ADA does not provide protection for anyone with any degree of physical or mental impairment: It provides protection only for those impairments that substantially limit their lives. I do not believe that Congress intended the ADA to protect as "disabled" all individuals whose life activities would *hypothetically* be substantially limited were they to stop taking medication.

Mecosta, 124 F.3d at 767 (Kennedy, J., concurring in part, dissenting in part) (emphasis added).

Thus, this Court should look no further than the statutory definition of the ADA to determine whether the use of medication or other corrective measures should be considered to determine whether an individual is substantially limited in a major life activity under part A of the ADA's "disability" definition. "The starting point in statutory interpretation is the language [of the statute] itself.'" *U.S. v. Ramirez-Ferrer*, 82 F.3d 1131, 1136 (1st Cir. 1996) (quoting *U.S. v. James*, 478 U.S. 597, 604 (1986)). For, as this Court has stated "time and again," the "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). Unless a statute's wording is unclear, a court should not even pause to consider arguments for a different interpretation based on legislative history or purpose. "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"

Id. (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Should the Court choose to look further than the plain language of the ADA, however, the Court will find that although conflicting, the legislative history ultimately supports the conclusion reached by the Court of Appeals below. The Reports of the House Education and Labor Committee, the House Judiciary Committee, and the Senate Committee on Labor and Human Resources ("Senate Labor Committee") all state that "whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as *reasonable accommodation or auxiliary aids*." H.R. Rep. No. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; H.R. Rep. No. 101-485, pt. 3, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 451; S. Rep. No. 101-116, at 23 (1989) (emphasis added). The two House Reports proceed to assert that mitigating measures include medication and assistive devices such as hearing aids. H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; H.R. Rep. No. 101-485, pt. 3, at 28-29, *reprinted in* 1990 U.S.C.C.A.N. at 451.

The Senate Report makes no such assertion, however. This suggests that at least one Congressional committee was referring to *employer* provided accommodations when stating that mitigating measures should not be considered. The ADA defines a "reasonable accommodation" in the context of the obligations an employer has with respect to an individual with a disability, and "auxiliary aids" in the context of the obligations a place of public accommodation has with respect to an individual with a disability. *See* 42 U.S.C. §§ 12111(9), 12182(b)(2)(iii). Further, in its discussion of the meaning of reasonable accommodation, the Senate report states emphatically that "[t]he Committee wishes to make it clear that non job-related personal use items such as hearing aids and eye-

glasses are not included in this provision." S. Rep. No. 101-116 at 33.

Further, the Senate Report unequivocally states that part of the rationale for including the "regarded as" prong in the overall definition of a "disability" was to cover individuals who, because of their ability to *control* an impairment, were *not in fact* substantially limited but nevertheless were *falsely* regarded as *being* substantially limited. This language indicates that the Senate contemplated that individuals who had controlled conditions and as a result were not in fact substantially limited would not be covered by part A of the "disability" definition. As the Report indicates:

> Another important goal of the third prong of the definition is to ensure that persons with medical conditions *that are under control,* and that therefore do not *currently* limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified.

S.Rep. No. 101-116, at 28. (emphasis added).[5]

The legislative history also underscores the plain language of the ADA that requires an individual to be substantially limited *in fact* in order to be covered by part A, thereby further verifying that Congress contemplated taking mitigating measures into account when ascertaining whether a disability exists. The Committee Reports state unequivocally that "[a] physical or mental impairment does not constitute a disability under the first prong of

[5] Senators Harkin, Dole, and Kennedy argue as *amicus* that this provision was not meant to suggest mitigating measures should be considered in ascertaining whether an individual has a disability. However, as this Court has previously held, "Legislative observations 10 years after passage of the Act are in no sense part of legislative history." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 202 (1977).

the definition for purposes of the ADA unless its severity is such that it results in a 'substantial limitation' of one or more major life activities." H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22. Evidence that the statute requires a current, functional analysis of limitation is demonstrated in an example in the Committee Reports:

> A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

H.R. Rep. No. 101-485, pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. at 334; S. Rep. No. 101-116, at 22.

This example confirms that Congress was focusing not on the hypothetical, but on how the individual actually is limited on a functional level in performing the major life activity. As one commentator noted, the "hypothetical approach is counterintuitive; legislative history and statutory provisions of the ADA do not support it." Erica W. Harris, *Controlled Impairments Under the Americans with Disabilities Act: A Search For the Meaning of Disability*, 73 *Wash. L. Rev.* 575, 580 (1998). Thus, putting the question of whether mitigating measures should be considered in the context of the overall guidance provided by Congress with regard to interpreting the definition of a disability, it becomes evident that Congress meant only for individuals functionally challenged to obtain protections under part A of the definition of a disability. Individuals who by virtue of medication or other devices are not substantially limited do not fall within the category of individuals to be protected.

B. The Court Should Not Defer to EEOC's Interpretive Guidance

1. *EEOC's Interpretive Guidance Is Not Entitled to Deference Because It Is Manifestly Contrary to the Statute*

Petitioners argue that the EEOC's interpretive guidance should be accorded deference under the so-called *Chevron* doctrine, which requires that a court defer to permissible agency statutory constructions where the statute itself is silent or ambiguous. *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Even assuming that the *Chevron* doctrine applies to agency interpretive rules, however, the EEOC rule at issue here would fail to meet the *Chevron* test. This is because the first prong of the *Chevron* analysis—the prerequisite for invoking the deference doctrine—requires that the statute be silent or ambiguous on the issue subject to the agency regulation.

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the courts is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43. *See also, I.N.S. v. Cardoza Fonseca,* 480 U.S. 421, 447-48 (1987). As explained above, the plain language of the ADA requires that the phrase "substantially limited" be assessed in light of the corrective measures available to the impaired individual.

Consequently, the petitioners' invocation of *Chevron* is inapplicable.

2. *The* Chevron *Doctrine Does Not Apply to Interpretive Rules*

Even if the Court were to find the statutory provisions at issue ambiguous, the *Chevron* doctrine should not apply to the EEOC rule at issue in this case. This is because the rule in question was promulgated not as a regulation or "legislative rule," but rather, as an "interpretive rule." This Court should definitively hold that the *Chevron* doctrine does not apply to interpretive rules.

The majority of the circuits that have addressed this issue have concluded that *Chevron* deference should not be accorded to interpretive rules. *Cent. Midwest Interstate Low-Level Waste Comm'n v. Pena,* 113 F.3d 1468, 1473 (7th Cir. 1997) ("we do not apply *Chevron's* "rubber stamp" to interpretive rules"); *Jacks v. Crabtree,* 114 F.3d 983, 985 n.1 (9th Cir. 1997) (*Chevron* applies to legislative rules, not policy guidance), *cert. denied,* 118 S. Ct. 1196 (1998); *Southern Ute Indian Tribe v. AMOCO Prod. Co.,* 119 F.3d 816, 833 (10th Cir. 1997), *on reh'g en banc, modified and adopted on other grounds,* 151 F.3d 1251 (1998), *cert. granted,* 119 S. Ct. 899 (1999); *Massachusetts v. FDIC,* 102 F.3d 615, 621 (1st Cir. 1996) (policy pronouncements less formal than legislative rules "are not accorded full *Chevron* deference"); *Washington,* 152 F.3d at 470-471 (interpretive rules not accorded *Chevron* deference).[6]

These courts prudently have concluded that such rules "are entitled to less deference than published regulations because they are not promulgated subject to the rigors of the Administrative Procedure Act, 5 U.S.C. § 553, includ-

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[6] *But see Herman v. Nationsbank Trust Co.,* 126 F.3d 1354, 1363-64 (11th Cir. 1997), *cert. denied,* 119 S. Ct. 54 (1998); *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170, 182 (3d Cir. 1995), *cert. denied,* 516 U.S. 1093 (1996).

ing public notice and comment, and 'are merely internal guidelines [that] may be altered by the [agency] at will.' " *Jacks*, 114 F.3d at 985 n.1 (citations omitted). The Tenth Circuit explained the danger of according *Chevron* deference to agency interpretive rules as follows:

> [A] practice of routine acceptance for interpretations expressed in [informal] formats would, in abdication of judicial duties under *Marbury*, endow them with force of law where Congress did not intend them to have such force. By this process, the agency would bind the public without itself being bound by interpretations in these formats. And since these formats are exempt from APA public participation requirements, *an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when applied to them.*

Southern Ute Indian Tribe, 119 F.3d at 833 (citation and footnotes omitted) (emphasis in original). Indeed, applying the *Chevron* rule to interpretive guidance effectively would render the notice and comment requirement of the APA nugatory, as agencies could issue legally binding mandates on nothing more than the political whims of the administrators.

For organizations such as EEAC, the Chamber, and MMA, such a rule would be highly troubling. Companies are highly regulated by numerous federal agencies. The notice and comment procedure of the APA provides companies the only available avenue to help shape policies that will greatly affect their operations. The absence of strict adherence to this requirement will lead to regulation by ambush. Based on these considerations, "the better-reasoned opinions" hold that interpretive rules are not entitled to *Chevron* deference. Kenneth Davis & Richard Pierce, Jr., Administrative Law Treatise § 3.5 at 55 (1998 Supp.).

In February 1991, when EEOC published its proposed ADA rules and guidance, the agency made no reference to the substantive rule of law that it now proclaims—that the phrase "substantially limited" must be made without regard to corrective devices or mitigating measures. 56 Fed. Reg. 8593 (1991). It was not until EEOC issued its final interpretive guidance, after all opportunity for comment by the regulated community had expired, that EEOC announced this purported rule of law. This is precisely the sort of danger that the Administrative Procedure Act was designed to prevent, and it is why this Court should refuse to accord *Chevron* deference to agency interpretive rules.

Although this Court has recognized that interpretive rules should be shown "some" deference where more than one interpretation of the statute is permissible, *Reno v. Koray*, 515 U.S. 50, 61 (1995), the Court has concluded that "interpretive rules . . . do not have the force and effect of law, and are not accorded that weight in the adjudicatory process." The weight accorded such rules is directly proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under this standard of review, no deference should be given to the interpretive rule at issue in this case.[7]

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[7] We also note that EEOC's guidance is internally inconsistent on this point, further reducing the deference that the Court should accord these rules. As noted above, the agency's Interpretative Guidance asserts that the evaluation of an individual's impairment should take place without regard to any mitigating measures taken. Yet, in its explanation of what "regarded as substantially limited" means, the agency states as follows:

> [T]he individual may have an impairment which is not substantially limiting, but is treated by the employer as having such an impairment. For example: an employee has controlled high blood pressure which does not substantially limit his work

C. At a Minimum, This Court Should Hold That the ADA Does Not Cover Individuals With Controlled, Minor Impairments That Are Widely Shared

Even if this Court determines that controlling measures should not be a factor in determining whether an individual is substantially limited, this Court should limit such a ruling as applicable only to serious impairments, as opposed to minor impairments that are common and easily controlled. If this Court extends ADA protection to individuals with impairments that are easily correctable and unremarkable, such as high blood pressure that can be controlled with medication, or poor vision that can be controlled by wearing ordinary eyeglasses, it will diffuse the protections given to those individuals actually in need of the ADA's protection, those individuals with true disabilities. Individuals with readily correctable impairments simply are not "substantially limited" compared to the average person. Indeed, in determining whether an impairment is substantially limiting, it "is to be measured in relation to normalcy, or in any event, to what the average person does." *Solileau v. Guilford of Maine*, 105 F.3d 12, 15-16 (1st Cir. 1997). The Second Circuit has emphasized that the Rehabilitation Act does not cover minor impairments that are not unusual:

> It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor and whose *relative severity of impairment* was widely shared. Indeed, the very concept of an impairment implies a characteristic that is not commonplace and that poses for the particular individual a more general disadvantage in his or her search for satisfactory employment.

activities. If an employer reassigns the individual to a less strenuous job because of unsubstantiated fear that the person would suffer a heart attack if he continues in the present job, the employer has "regarded" this person as disabled.

29 C.F.R. App. § 1630.2(1). Thus, EEOC's own example implicitly recognizes that if a condition can be "controlled," the individual may not be substantially limited.

Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (emphasis added) (quoting *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986)).

Even two of the courts of appeals that have deferred to the EEOC guidance on the question of mitigating measures limited their rulings to suggest that the guidance is not necessarily applicable when minor or widely shared impairments are at issue. The Fifth Circuit held that the EEOC's interpretative guidance and legislative history suggested mitigating measures should *not* be considered in finding that an individual with Adult Stills Disease had a disability,[8] but limited its holding as applicable only to "serious impairments and ailments:"

> There is nothing in the Interpretative Guidelines or the legislative history that suggests that *all* impairments must be considered in their unmitigated states and *no* mitigating measures may ever be taken into account. We hold that only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state.

Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464, 470 (5th Cir. 1998).

Likewise, the First Circuit, which also determined that an individual with diabetes mellitus should be evaluated without the use of mitigating measures to determine if he had a disability, "venture[d] no opinion as to whether [it] would reach the same conclusion if other medical conditions or other facts were presented." *Arnold v. UPS*, 136 F.3d 854, 866 (1st Cir. 1998). The First Circuit sug-

[8] The Fifth Circuit reached this conclusion despite the fact it felt that the argument that mitigating measures *should* be taken into account "offered the most *reasonable* reading of the ADA." *Id.*

gested that it might take a different approach if a non-serious condition was at issue:

> For example, we might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses. The availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of "minor trivial impairment," Senate Report at 23, that would not be considered a disability under the ADA.

Id. at n.10.

Thus, even the courts that have taken the position that mitigating measures should not be a factor in determining whether an individual is substantially limited only take this position so far. These courts acknowledge that to establish standing under part A of the ADA's definition of a "disability," a condition should not be shared by a significant portion of the general population. Therefore, at the very minimum, this Court should endorse Congress' intent that the ADA does not cover individuals with minor, widely shared impairments that are readily and easily correctable.

D. A Ruling That the Use of Corrective Measures Should Be Considered In Determining Whether An Individual Is Substantially Limited Will Not Discourage the Use of Corrective Measuress

Petitioners and several of their *amici* argue that a holding that corrective measures are to be taken into account to ascertain whether a disability exists will encourage individuals to refrain from using corrective measures in order to obtain the Act's protections. This argument is specious for several reasons.

First, the purpose of the ADA is to create a level playing field for individuals with and without disabilities. *Siefken v. Village of Arlington Heights*, 65 F.3d 664, 666

(7th Cir. 1995). Essentially, Congress designed the ADA to help those individuals who could not help themselves, not to give special privileges to individuals who could control the effects of an impairment but chose not to. Indeed, part of Congress' findings in passing the ADA includes the following:

> Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are *beyond the control of such individuals* and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. § 12101(A)(7) (emphasis added). To argue that the ADA's protections provide an incentive to forego medical treatment is clearly counter to the purpose of the ADA.

Moreover, the argument that the consideration of controlled measures in determining whether an individual has a disability will prevent self-help, taken to its extreme, suggests that the ADA could motivate individuals to inflict injuries on themselves to obtain the Act's protections. It is difficult to believe that individuals would act in such an irrational manner. As one commentator pointed out:

> Most obviously, rational people will not cease to mitigate their impairments because the cost of living with an impairment that substantially limits a major life activity, even when combined with the added benefit of more generous ADA protection, is far greater than the cost of undertaking such measures. Rational individuals would pay a hundred dollars per month for medication that would enable them to live free of severe pain rather than sit at home

> in pain to save a thousand dollars per month and receive the benefits of ADA protection.

Harris, *supra*, at 600-601.

Ms. Harris also observes that an individual who chooses not to control his or her impairment may not be able to perform the essential functions of a job, with or without a reasonable accommodation and thus will not be "qualified" under the ADA. *Id. See also* 42 U.S.C. § 12111(8). Indeed, as the Eighth Circuit recently decided, a police recruit who failed to control his diabetes with medication was not a qualified individual with a disability and therefore could not establish a cause of action under the ADA. *Burroughs v. City of Springfield*, 163 F.3d 505 (8th Cir. 1998). *See also Siefken v. Village of Arlington Heights*, 65 F.3d 664, 667 (7th Cir. 1995) ("When an employee knows that he is afflicted with a disability but needs no accommodation from his employer, and fails to meet the employer's 'legitimate job expectations,' due to his failure to control a controllable disability, he cannot state a cause of action under the ADA.") (citation omitted).

An individual's efforts to control the effects of an impairment do not automatically disqualify the individual from the Act's protections. However, "an individual's use of medication, or even a prosthetic limb, is part and parcel of their condition. Thus, if as part of that condition, they are capable of performing major life activities the same as an individual without the condition, they are not actually 'substantially limited' from performing a major life activity and therefore are not protected by the ADA." Adam C. Wit, *Should "Mitigating Measures" Be Considered in the "Disability" Analysis under the ADA?* 24 Empl. Rel. L. J. 73, 88 (Summer 1998). The notion that individuals will avoid self-help simply to achieve the Act's protections is unpersuasive and should not be endorsed as a legitimate reason to expand the protections of the statute beyond its intended reach.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EMPLOYERS DID NOT "REGARD" THE PETITIONERS AS DISABLED

A. The ADA Requires That a Plaintiff Establish That an Employer Regarded the Individual as Substantially Limited in a Major Life Activity To Establish That the Individual Is "Regarded As" Disabled

An individual also can establish that he or she has a disability under the ADA by showing that he or she was "regarded as" having an impairment that substantially limits a major life activity. 42 U.S.C. § 12102(2)(C) (hereinafter referred to as the "regarded as" prong).[9] Thus, it is not sufficient for a plaintiff simply to allege that he or she is "regarded as" having an impairment to establish standing under the "regarded as" prong of the statute. Rather, the plaintiff must show that the employer regarded him or her as having an impairment that substantially limits a major life activity. "As with real impairments, . . . a perceived impairment must be substantially limiting and significant." *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (9th Cir. 1997), *citing Gordon v. E.L. Hamm & Assoc., Inc.*, 100 F.3d 907, 913 (11th Cir. 1996).

1. *The Perception That an Individual Is Unable To Perform a Particular Job Does Not Translate Into a Perception That the Individual Is Substantially Limited*

The majority of cases brought by plaintiffs under the "regarded as" prong of the ADA rest on allegations that

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[9] Congress emphasized that this prong was designed to protect the individual who was not hired because of the "negative reactions" of employers, and adopted the rationale used in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which this Court concluded that Congress drafted the Rehabilitation Act to address the fact that "society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from the actual impairment." H.R. Rep. No. 101-485, pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. at 335.

the plaintiff is regarded as substantially limited in the major life activity of "working" because the individual was denied a job opportunity as the result of an impairment. However, as the Fifth Circuit has observed, "[a]n employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job." *Pryor v. Trane Co.*, 138 F.3d 1024, 1028 (5th Cir. 1998). Nor does working mean "working at a particular job of that person's choice." *Wooten v. Farmland Foods*, 58 F.3d 382, 386 (8th Cir. 1995). *See also* 29 C.F.R. App. § 1630.2.

Rather, "a finding that a plaintiff is substantially limited in working requires a showing that her overall employment opportunities are limited." *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir. 1998). *See also Baulos v. Roadway Exp. Inc.*, 139 F.3d 1147, 1151 (7th Cir. 1998) ("It is now well-established that an inability to perform a particular job for a particular employer is not sufficient to establish a substantial limitation on the ability to work; rather, the impairment must substantially limit employment generally.")[10] Thus, it is not enough that a plaintiff simply allege that he or she is precluded from a particular job to establish a claim under the "regarded as" prong of the ADA based on a limitation in working. Instead, an individual must establish that the employer regards the individual as substantially limited in a broad range of job opportunities.

Applying this logic, the Eleventh Circuit found that an individual who had a personality disorder and therefore

[10] Courts interpreting the Rehabilitation Act also have concluded that "an impairment that interfered with an individual's ability to do a particular job, but did not significantly decrease that individual's ability to obtain satisfactory employment otherwise, was not *substantially* limiting within the meaning of the statute." *Jasany v. United States Postal Service*, 755 F.2d 1244, 1248 (6th Cir. 1995) (emphasis in original).

was denied FAA Class I Medical Certification was not substantially limited in the major life activity of working merely because he could no longer fly a commercial aircraft. *Witter v. Delta Air Lines*, 138 F.3d 1366, 1370 (11th Cir. 1998). In making such a finding, the court observed that

> there are non-pilot jobs which utilize "similar training, knowledge, skills or abilities as piloting jobs." Such jobs include pilot ground trainer, flight simulator trainer, flight instructor, aeronautical school instructor, as well as executive, management, and administrative positions in flight operations for airlines, and being a consultant for an aircraft manufacturer.

Id.[11]

Thus, rejection from a person's job of choice is not enough to establish an individual is substantially limited in the major life activity of working. Rather, an individ-

[11] Indeed, the EEOC uses the following example to demonstrate the concept of someone not substantially limited in the major life activity of working:

> A person who cannot qualify as a commercial airline pilot because of a minor vision impairment, but who could qualify as a co-pilot or a pilot for a courier service, would not be considered substantially limited in working just because he could not perform a particular job. Similarly, a baseball pitcher who develops a bad elbow and can no longer pitch would not be substantially limited in working because he could no longer perform the specialized job of pitching baseball.

EEOC, *A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act* II-6 (1992). Conveniently, the EEOC argues as *amicus* in these cases that this example does not apply because the petitioner disputes it and because the example assumes that an individual could obtain a co-pilot position. What the EEOC overlooks, however, is that the example also states the individual could qualify for a co-pilot or pilot for a courier service. Indeed, the plaintiffs in *Sutton* do currently fly planes. Thus, the example demonstrates that an individual, who is not completely precluded from utilizing his or her training, education, and job abilities, is not substantially limited in the major life activity of working.

ual must be precluded from the universe of jobs open to the individual in question based on that individual's skills and training. *See McKay v. Toyota Motor Mfg.*, 110 F.3d 369, 373 (6th Cir. 1997) (A plaintiff is not substantially limited in working, when "the condition does not significantly restrict her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.") Congress did not intend to give individuals the opportunity to establish a "regarded as" case against an employer simply because an impairment precluded them from performing a specific job they wanted. Rather, the "regarded as" prong protects only individuals who have impairments that limit them, due to "myth or stereotype," from performing major life activities as compared to the general population. The specialized activities of flying commercial planes or holding DOT licenses are not the types of activities most individuals are regarded as having the capability to perform.

2. *An Employment Rejection Based on a Medical Condition Is Not Enough To Establish an Issue of Fact That an Employer Regarded an Individual as Disabled*

Petitioners and several of their *amici* assert that when an employer rejects an individual from employment based on a medical condition, an issue of fact is created that the employer regards the individual as disabled. This argument ignores the requirement that a plaintiff show the employer regards the individual as having an impairment that substantially limits a major life activity in order to establish a "regarded as" case.

Numerous courts have rejected the notion that an individual can establish a "regarded as" claim only because he or she was denied employment opportunities based on physical standards. In *Smith v. City of Des Moines*, 99 F.3d 1466, 1474 (8th Cir. 1996), the Eighth Circuit

found that the plaintiff failed to create a genuine issue of fact as to whether the city regarded him as having a disability when he was removed from a firefighter position because he failed to meet the required standards on a breathing capacity test. In finding that Smith was not regarded as being unable to perform any other jobs except that of a firefighter, the court noted that Smith had gone back to school and had taken another job when on leave from the fire department. *Id. See also Bridges v. City of Bossier*, 92 F.3d 329, 336 (5th Cir. 1996) (an individual with hemophilia who could not hold a firefighting position as a result of failure to meet physical qualification standards was not "regarded as" disabled), *cert. denied*, 519 U.S. 1093 (1997).

Similarly, in interpreting the Rehabilitation Act, the Fifth Circuit found that an employer does not regard an employee as disabled merely because the employee fails to meet physical standards patterned on Department of Transportation regulations. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 511 U.S. 1101 (1994). The Fifth Circuit noted that "[a]n employer's belief that an employee is unable to perform one task with an adequate safety margin does not establish per se that the employer regards the employee as having a substantial limitation on his ability to work in general." *Id.* at 1393.

Courts also have rejected a "regarded as" claim when an individual was denied employment opportunities based on limitations imposed by an individual's own physician. In *Thompson v. Holy Family Hosp.*, 121 F.3d 537 (9th Cir. 1997), the Ninth Circuit rejected a "regarded as" claim by an individual who could not lift more than 25 pounds due to a work related injury and who eventually was terminated because she could not perform the essential functions of the job. The Ninth Circuit confirmed that, "an employer's decision to terminate an employee

'based upon the physical restrictions imposed by [her] doctor . . . does not indicate that [the employer] regarded [her] as having a substantially limiting impairment.'" *Thompson*, 121 F.3d at 541, *citing Wooten*, 58 F.3d 382, 386 (10th Cir. 1995).

The ADA requires that individuals be *perceived as substantially limited* to obtain the Act's protections. To establish a rule that anyone with an impairment can always establish standing under the "regarded as" prong of the ADA based solely on a qualification standard involving physical criteria expands the Act beyond its intended reach. A decision to reject an individual solely based on a physical standard or a medical condition is a determination of whether an individual is qualified for a particular employment position, not that the individual is necessarily perceived as substantially limited in general.

B. A Ruling That a "Regarded As" Claim Can Be Established Based on Medical or Physical Criteria Used in Rejecting an Individual From an Employment Opportunity Will Restrict Significantly an Employer's Ability To Establish Job Qualifications

To allow an individual to establish a "regarded as" claim simply because an individual was rejected from an employment position because he or she could not meet the employer's criteria would unduly restrict employers from maintaining qualification standards in the workplace. The costs of litigating the standard every time an individual suffered an adverse job action would be prohibitive. It is difficult to believe that Congress intended such a result. Indeed, as EEAC and the Chamber argued in their brief to this Court in *Albertsons v. Kirkingburg*, 98-591, employers should be able to rely on physical criteria to establish job qualifications if consistent with business necessity. *See* 42 U.S.C. § 12113(a). Whether or not a qualification standard is consistent with business necessity, however, does not translate into a right to sue

under the "regarded as" prong of the ADA's disability definition.

According to Petitioners' logic, any employee rejected for a job based on a medical condition or impairment could maintain standing to sue an employer without any showing that the employer believed the individual was substantially limited in a major life activity. A hypothetical demonstrates this result. Two individuals apply for a lead in a Broadway musical. Both have dreams of stardom and both have taken voice lessons. One has a poor voice because of a throat disorder while the other has a poor voice because of bad luck. The producer rejects both individuals because of a simple belief that neither individual has a voice that is of sufficient quality to participate in the musical, not because she believes—or even considered—that one or both of the individuals has a throat disorder. Petitioners' argument would support the notion that the producer could not reject either applicant without risking a "regarded as" claim.

While this example simply involves public taste, the cases before the Court involve public safety. Employers develop standards such as these to maintain a workforce that exceeds the physical qualifications of the average individual. Therefore, *both* the average member of the general population and the individual who is substantially limited compared to the average member of the general population will be precluded from such employment opportunities. This preclusion does not equal a "regarded as" claim according to the statutory definition of a "disability" which requires some evidence that the individual was "regarded as" substantially limited.

A ruling that a "regarded as" claim exists simply because employers have relied on medical information about the employee, or simply utilized physical criteria in developing job qualifications, will deter employers from developing legitimate job qualifications, hindering a com-

pany from effectively doing business. This Court should not permit such a result.

CONCLUSION

For the foregoing reasons, *amici* the Equal Employment Advisory Council, The Chamber of Commerce of the United States of America, and the Michigan Manufacturers Association respectfully submit that the decisions below should be affirmed.

Respectfully submitted,

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